UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, *et al.* Plaintiffs,	:	
vs.	:	C.A. No. 04-312-L
JEFFREY DERDERIAN, *et al.* Defendants.	:	

PLAINTIFFS' OBJECTION TO DEFENDANTS DENIS LAROCQUE, ANTHONY BETTENCOURT AND MALCOLM MOORE IN HIS CAPACITY AS FINANCE DIRECTOR FOR THE TOWN OF WEST WARWICK'S MOTION TO DISMISS IN LIEU OF ANSWER

Plaintiffs hereby object to Defendants Denis Larocque, Anthony Bettencourt and Malcolm Moore in his Capacity as Finance Director for the Town of West Warwick's Motion to Dismiss in Lieu of Answer as set forth in the Memorandum of Law in Support of this Objection.

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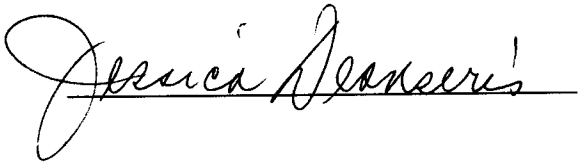

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS DENIS LAROCQUE, ANTHONY BETTENCOURT AND MALCOLM MOORE IN HIS CAPACITY AS FINANCE DIRECTOR FOR THE TOWN OF WEST WARWICK'S MOTION TO DISMISS IN LIEU OF ANSWER

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flammable egg crate material at The Station, which was installed in or about the summer of 2000, was a violation of the R.I. Fire Safety Code. In addition, the ignition of pyrotechnics without a permit was a violation of the Rhode Island General Laws. Several other conditions which constituted violations of the R.I. Fire Safety Code existed at The Station on the evening of February 20, 2003. As a result of the fire, one hundred individuals were killed and approximately two hundred individuals were injured.

Deputy State Fire Marshal Larocque personally inspected The Station on at least three occasions prior to February 20, 2003. His inspections failed to identify several violations of the R.I. Fire Safety Code including the existence of the highly flammable egg crate material. In addition, at least one violation of the R.I. Fire Safety Code which existed on the evening of February 20, 2003 also existed during Larocque's two prior inspections. Specifically, Larocque's November 10, 2001 inspection report states, "door near stage cannot swing in." Larocque's November 20, 2002 report, created only three months prior to the fire, indicates the same violation by stating, "exit door swings wrong direction (stage door)." This same violation is apparent from videotape of the fire on February 20, 2003. In addition, Larocque increased the maximum occupancy of The Station in March of 2000 by classifying the entire premises as "standing room," contrary to a report that he prepared only three months earlier.

Bettencourt, a West Warwick police officer, was working a privately-paid security detail at The Station on the evening of February 20, 2003. In the aftermath of the fire, a counting device was found which was apparently used to establish The Station's occupancy on the evening of the fire. The Station was occupied beyond the capacity allowed by the R.I. Fire Safety Code on the evening of February 20, 2003.

STANDARD OF REVIEW

The Town Defendants' motion must be denied unless it is "clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the plaintiff's claim." Ellis v. Rhode Island Public Transport Authority, 586 A.2d 1055, 1057 (R.I. 1991). "The complaint should not be dismissed merely because Plaintiffs' allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357. "The standard for granting a Rule 12(b)(6) motion is identical to that for giving a judgment on the pleadings under Rule 12(c): the defendant must be able to demonstrate to a certainty that the plaintiff will not be entitled to relief under any set of facts that might be proved at trial in support of his or her claim." Haley v. Town of Lincoln, 611 A.2d 845, 850 n. 1 (R.I. 1992).

ARGUMENT

I. RHODE ISLAND LAW RECOGNIZES A CAUSE OF ACTION ARISING FROM NEGLIGENTLY PERFORMED GOVERNMENTAL BUILDING INSPECTIONS

In Rhode Island, the State and/or local municipalities will be held liable for the negligent performance of a building inspection if the conduct of the local official is egregious. It may be true that no duty to enforce fire and building codes existed at common law. However, Rhode Island precedent and the common law recognize a duty to act carefully after the assumption of an activity such as the inspection of a building, or the performance of security services. This is the specific duty which Plaintiffs allege that the Town Defendants breached. The duty to act carefully after affirmative conduct is distinguishable from cases where no attempt to enforce municipal regulations has occurred, and the Town Defendants' reliance on the latter category is misplaced.

A. Rhode Island Case Law Evidences A Public Policy Favoring Municipal Liability For Negligently Performed Building Inspections

1. The Rhode Island Supreme Court Has Imposed Liability On Municipalities For Negligent Building Inspections

The negligent performance of a building inspection has been held to be actionable in Rhode Island. For example, in Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994), plaintiffs alleged that a local building inspector failed to properly inspect condominiums and approved construction work which violated the building code. Id. at 747-748. The city argued that it could not be held liable for defective construction because its ". . . permits and the inspections are not insurance policies wherein the municipality guarantees that each building is in compliance with the code." 641 A.2d at 750. However, the Rhode Island Supreme Court disagreed by ruling that the city would be liable if plaintiffs were able to prove: (1) that a special duty was owed to the plaintiffs, or (2) that the city's conduct was egregious. 641 A.2d at 750.[1]

Two years later, the Rhode Island Supreme Court again ruled that a building inspector could be held liable for the negligent performance of his duties. In Boland v. Tiverton, 670 A.2d 1245 (R.I. 1996), the town building inspector issued a certificate of occupancy despite the fact that the house construction was incomplete and building code violations existed when he inspected the premises. Id. at 1246. Subsequently, plaintiffs filed suit against the Town of Tiverton alleging "negligent performance of the building inspections by the Town's building inspector." 670 A.2d at 1247. The Rhode Island Supreme Court vacated the order which granted summary judgment to the Town of Tiverton holding, "[T]his court notes that the record before us contains sufficient facts that, if more fully developed at trial, as in Quality Court, it

[1] The Rhode Island Supreme Court found it unnecessary to analyze the facts of this case under the egregious conduct exception to the public duty doctrine because it first found that a special duty existed. Quality Court Condominium Assn., 641 A.2d at 751 .

could probably support a finding of either a special duty owed to the Bolands or egregious conduct by the Town." 670 A.2d at 1249. The court explained that an action can be founded upon a building inspector's negligence:

> We understand that, when making her decision in this case, the trial justice did not have available to her the benefit of Quality Court, supra, and its discussion of the relationship between the enforcement of the building code and the liability of municipalities for the negligence of its building inspectors.

670 A.2d at 1249. (emphasis added). More recently, the Rhode Island Supreme Court has continued to analyze negligent building inspection cases under the special duty and egregious conduct exceptions to the public duty doctrine. For instance, in Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), plaintiff's allegations were analyzed under the egregious conduct exception:

> . . . plaintiffs have not presented any evidence that the Town, before its issuance of the certificate of occupancy, was so negligent that its inspection amounted to egregious conduct or created a situation of extreme peril that it then disregarded.

813 A.2d at 65-66. (emphasis added). Similarly, in Torres v. Damicis, 853 A.2d 1233 (R.I. 2004), the Rhode Island Supreme Court ruled that plaintiff's claims against a town building inspector could go forward if he could ". . . prove that his circumstances qualify under one of the exceptions to the public duty doctrine . . ." Id. at 1239.[2] Clearly, Haworth and Torres would not have reached the issue of whether the municipality acted in an egregious manner if an actionable duty did not exist. The distinction between a statutory duty to take action and the common law duty to exercise care after the voluntary assumption of a duty was succinctly stated by the Alaska Supreme Court:

> We do not reach the issue of whether the State had a statutory duty to take action concerning hazards discovered at the Gold Rush, because we find that the State assumed a common law duty by its affirmative conduct. It is ancient learning that

[2] In both Haworth and Torres, the plaintiffs appealed from grants of summary judgment where no issue of material fact existed as to whether the special duty or egregious conduct exceptions to the public duty doctrine applied. Haworth, 813 A.2d at 63; Torres, 853 A.2d at 1253. Importantly, both cases had the benefit of discovery, unlike the case at bar.

> one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully . . .

Adams, 555 P.2d at 240. (emphasis added). In Adams, fire inspectors found several violations at the Gold Rush Hotel which constituted extreme life hazards; however, no further action was taken and a fire killed five individuals and injured several others. 555 P.2d at 239-240.

In conclusion, Rhode Island recognizes an actionable duty when building inspections are negligently performed. Only the public duty doctrine may afford protection from negligent performance of building inspections. Building inspectors and deputy state fire marshals have similar mandates and almost identical functions. Therefore, it would be illogical to make a distinction between negligence actions against building inspectors (alleging egregious conduct), which are clearly allowed in Rhode Island, and negligence actions against deputy state fire marshals (also alleging egregious conduct).

2. Defendants' Reliance Upon Failure-To-Enforce Cases is Misplaced

The Town Defendants mistakenly rely upon cases which have held that a state/municipality's omission in enforcing regulations does not give rise to a cause of action. Plaintiffs acknowledge that where no attempt at enforcement occurs, an actionable duty may not readily arise.

In Grogan v. Commonwealth of Kentucky, 577 S.W.2d 4 (Ky. 1979), an action followed a fire at the Beverly Hills Supper Club which resulted in a number of deaths and personal injuries. Id. at 4. The Kentucky Supreme Court ruled that the government would not be liable when it does not attempt to enforce laws instituted for public protection:

> The answer . . . is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.

577 S.W.2d at 5. (emphasis added). In Grogan, it is clear that the court was ruling on a government's failure to enforce its regulations as opposed to being egregiously negligent during the performance of an inspection.[3]

The Town Defendants also rely upon Vermont caselaw in support of their position that no common law right of action exists for a municipality's failure to enforce an ordinance. In Corbin v. Buchanan, 163 Vt. 141, 657 A.2d 170 (1995), a third floor apartment, which did not have smoke detectors, caught fire and killed a young boy. Id. at 143, 171. In Corbin, the town defendant ". . . did not conduct regular inspections of existing buildings, but enforced the codes in response to complaints . . .". 163 Vt. at 143, 657 A.2d at 171-172. Despite the fact that a town employee inspected (a different) first floor apartment of the building in question and observed a missing smoke detector in that unit, ". . . no complaints were received from other tenants, and no inspection of other apartments in the building was ever conducted." 163 Vt. at 143, 657 A.2d at 172. (emphasis added). In Corbin, the Vermont Supreme Court reversed a jury verdict in favor of plaintiffs by holding that no action exists against the municipality for its failure to enforce an ordinance. 163 Vt. at 143, 657 A.2d at 171-172. By contrast to Grogan and Corbin, Larocque inspected The Station on at least three occasions prior to Plaintiffs' injuries and Bettencourt was actually working at The Station on the evening of the fire.

The Town Defendants attempt to further their argument that Plaintiffs' action is not statutorily supported by comparing the R.I. Fire Safety Code to other Rhode Island statutes which do not contain provisions permitting civil liability. Again, the Town Defendants

[3] The Town Defendants rely upon Bolden v. City of Covington, 803 S.W.2d 577 (Ky. 1991) in support of its argument that "... there was no cause of action under the common law against a municipality for its negligent enforcement of regulatory schemes." Town Defendants' Memorandum, pp. 5,7. However, Bolden turned on the issue of quasi-judicial immunity. As stated by the Kentucky Supreme Court, "[t]he issue here is whether the City of Covington can be held legally responsible because the city director of housing development did not take further action to close and placard the building at 814 Scott Street when the building owner did not sufficiently repair it." Bolden, 803 S.W.2d at 579.

misunderstand the basis of Plaintiffs' negligence action. For instance, in Bandoni v. State of Rhode Island, 715 A.2d 580 (R.I. 1998), which is relied upon by the Town Defendants, the plaintiffs brought a negligence claim against the State and a town for failing to perform their statutory duty to advise plaintiffs that they had a right to address the court during a criminal sentencing under the Victims' Bill of Rights statute (R.I. Gen. Laws § 12-28-1 et seq.). The Town Defendants also rely upon Accent Store Design, Inc. v. Marathon House, 674 A.2d 1223 (R.I. 1996), where an action was filed against a state agency alleging negligence in failing to comply with the Rhode Island public works bonding statute (R.I. Gen. Laws § 37-13-14). (In Accent Store Design, Inc., the agency failed to require a contractor to obtain a statutorily mandated bond. 674 A.2d at 1225.) In both Bandoni and Accent Store Design, Inc., the Rhode Island Supreme Court ruled that the absence of a remedy in a statutory scheme is evidence that the General Assembly did not intend to create a tort subjecting the government to liability. Bandoni, 715 A.2d 584; Accent Store Design, Inc., 674 A.2d at 1226.

However, the Town Defendants had a common law duty to exercise reasonable care after undertaking inspections and security services at The Station, as recognized in Quality Court Condominium Assn., Boland, Haworth, and Torres. Plaintiffs do not allege that their cause of action arises directly from the Fire Safety Code; therefore, the cases of Grogan, Corbin, Bandoni, and Accent Store Design, Inc. are not controlling. The R.I. Fire Safety Code merely serves as evidence of the proper standard of care in this matter.

3. The Town Defendants' Reliance Upon Kentucky and Vermont Cases is Misplaced

As discussed supra, the Town Defendants' reliance upon case law of Kentucky and Vermont is misplaced because the cases cited relate to the complete failure to enforce regulations as opposed to the affirmative act of a negligent inspection. However, a further review of the

cases cited by the Town Defendants reveals tort schemes quite different from Rhode Island's. For instance, in Commonwealth of Kentucky v. Brown, 605 S.W.2d 497 (Ky. 1980), the Kentucky Supreme Court distinguished the Kentucky Tort Claims Act from the Federal Tort Claims Act and the Florida Tort Claims Act (both similar to Rhode Island's Tort Claims Act) by stating, "Both of these statutes, by express terms, provide that the government is to be treated as if it were a private individual. Our statute mandates no such treatment of the Commonwealth." Id. at 498. Of course, both the Federal Tort Claims Act and the Rhode Island Tort Claims Act indicate that the government shall be liable in the same manner as a private individual. 28 U.S.C. § 2674, R.I. Gen. Laws § 9-31-1. The case of Corbin v. Buchanan, 163 Vt. 141, 657 A.2d 170 (1995) is also distinguishable in that the Supreme Court of Vermont upheld a town's ordinance which expressly prohibited a private cause of action against the town. Of course, the Town Defendants here have not and, indeed, cannot assert that any local ordinance expressly prohibits Plaintiffs' action.

II. THERE IS NO QUASI-JUDICIAL IMMUNITY FOR MINISTERIAL INSPECTION FUNCTIONS

Larocque is not entitled to quasi-judicial immunity because his responsibilities to strictly enforce the quantifiable provisions of the R.I. Fire Safety Code were ministerial. He did not hold hearings or weigh evidence, nor did he exercise discretion of a judicial nature in his capacity as Deputy State Fire Marshal. Therefore, his reliance upon this doctrine is misplaced.

A. Defendants' Reliance On Rhode Island Administrative Agency Cases Is Misplaced

In Suitor v. Nugent, 98 R.I. 56, 199 A.2d 722 (1964), the Rhode Island Supreme Court afforded quasi-judicial immunity to the Attorney General where he exercised prosecutorial discretion. Id. at 58, 723. The court ruled, "It is clear . . . that the Attorney General, in acting to

enforce the criminal law, performs acts which require an exercise of judgment or discretion and are in the nature of judicial acts and that, when so acting, he acts as a quasi-judicial officer." 98 R.I. at 61, 199 A.2d at 724. In that case the Rhode Island Supreme Court adopted the definition of "quasi-judicial immunity" set forth in State v. Winne, 21 N.J.Super. 180, 91 A.2d 65, which defined that doctrine as ". . . the action and discretion of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." Suitor, 98 R.I. at 61, 199 A.2d at 724.

Following its decision in Suitor, the Rhode Island Supreme Court extended quasi-judicial immunity to the Department of Environmental Management in Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865 (R.I. 1998), and to the Rhode Island Disability Determination Service in Psilopoulos v. State of Rhode Island, 636 A.2d 727 (R.I. 1994). In Mall at Coventry Joint Venture, the Rhode Island Supreme Court held that quasi-judicial immunity ". . . is available in respect to any decision issued by DEM . . ." 721 A.2d at 869.[4] In Psilopoulos, Social Security benefits were denied by federal authorities on the basis of recommendations of physicians employed by the State of Rhode Island and upon recommendations of state administrators. 636 A.2d at 727.

Larocque's actions and the division of state fire marshal are clearly distinguishable from the actions and agencies involved in Psilopoulos and Mall at Coventry Joint Venture. Contrary to Psilopoulos, Larocque did not make judgment decisions based on (medical) recommendations

[4] In Mall at Coventry Joint Venture, a trial justice entered judgment as a matter of law to the defendants by determining that the plaintiff failed to establish reasonable reliance on DEM's actions and that the plaintiff failed to complete its formal application. 721 A.2d at 868. However, the Rhode Island Supreme Court ruled, "Although the trial justice did not rely on the doctrine of quasi-judicial immunity in granting the judgment as a matter of law, we are of the opinion that this doctrine would have been an appropriate rationale for his decision. We often have stated that this court may affirm a justice of the Superior Court on grounds other than those which he or she has utilized in determining the outcome of the case." 721 A.2d at 869.

of others. Contrary to Mall at Coventry Joint Venture, where DEM, an administrative agency, concluded that a proposal represented a significant alteration of fresh water wetlands and, therefore, requested a formal application from plaintiffs, Larocque did not have such discretion. His exclusive function was to inspect properties and to identify quantifiable violations of the R.I. Fire Safety Code.

B. Ministerial Functions Are Not Immune From Liability, While Discretionary Ones Are

The acts performed by Larocque were ministerial in nature and as a result he is not entitled to quasi-judicial immunity. He was obligated to strictly enforce the quantifiable provisions of the R.I. Fire Safety Code without regard to his own opinions. Ministerial acts have been defined as follows:

> A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to his own judgment or opinion. . . .

State v. Winne, 21 N.J.Super. at 74, 91 A.2d at 199.[5] The R.I. Fire Safety Code § 1-4.1 specifically states "[t]he State Fire Marshal is the sole authority having jurisdiction for the strict enforcement of the provisions of this Code. The State Fire Marshal shall have authority to appoint and certify as many deputy state fire marshals and assistant deputy state fire marshals as are deemed necessary to strictly enforce the provisions of this Code." (emphasis added). Importantly, § 1-4.1 goes on to indicate that discretion lies only with the Fire Safety Code Board of Appeal and Review:

> . . . the Fire Safety Code Board of Appeal and Review is the sole authority having jurisdiction to grant variances, waivers, modifications and amendments from or to review and accept any proposed fire safety equivalencies and alternatives to, the strict adherence to the provisions of this Code . . .

[5] In Winne, it was held that a prosecuting attorney was entitled to quasi-judicial immunity where it was alleged that he was malfeasant in failing to suppress illegal gambling. 21 N.J.Super. at 77, 91 A.2d at 205.

R.I. Fire Safety Code, § 1-4.1. (emphasis added). In fact, the R.I. Fire Safety Code is so precise that Larocque had no discretion in identifying violations during his inspections, as evidenced by the following representative statutes:

> **R.I. Gen. Laws § 23-28.6-3**. Maximum occupancy. - The occupant load . . . shall be determined by dividing the net floor area or space by the square feet per occupant . . .
>
> **R.I. Gen. Laws § 23-28.6-4**. Standing conditions. – (a) Standing patrons may be allowed in places of assembly at the rate of one person for each five square feet (5 sq. ft.) of area available for standing . . .
>
> **R.I. Gen. Laws § 23-28.6-5**. Admissions restricted and supervised. – (b) The maximum occupancy of all areas shall be conspicuously posted by means of a sign . . .
>
> **R.I. Gen. Laws § 23-28.6-7**. Egress passageways. – (a) The distance of travel from any point within the place of assembly to an approved egress opening therefrom shall not exceed one hundred-fifty feet (150') in non-sprinklered buildings . . . (c) All new doorways and connecting passageways to the outside, to be considered as means of egress, shall be at least thirty-six inches (36") in width and at least seventy-eight inches (78") in height, . . . All existing doorways and connecting passageways to the outside to be considered as means of egress, shall be at least thirty-two inches (32") in width and at least seventy-four inches (74") in height.

If a violation were found by Larocque during the course of his duties, he again had no discretion and was responsible to simply order that the violation be remedied. R.I. Fire Safety Code § 1-4.4. Sections 1-4.5 and 1-4.14 provide the Chairman of the Board (not Larocque) with discretion to summarily abate conditions which are in violation of the R.I. Fire Safety Code or to order the immediate evacuation of a premises deemed unsafe because of R.I. Fire Safety Code violations. In addition, Larocque is not included in the class of individuals identified in R.I. Gen. Laws § 23-28.2-14 which creates an enforcement unit responsible to initiate criminal prosecutions against persons in violation of the R.I. Fire Safety Code.

Larocque was more akin to a police officer responsible for identifying violations. The distinction between prosecutors entitled to quasi-judicial immunity and a county building inspector who was not entitled to quasi-judicial immunity was explained in Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003). In Andrews, a building inspector, upon the advice of a prosecutor, filed a criminal complaint against three individuals alleging violations of the building code. Andrews, 266 Va. at 317, 585 S.E.2d at 783. Subsequently, actions were filed by the three individuals against the prosecutor and the building official. 266 Va. at 317, 585 S.E.2d at 783. First, the court held that the prosecutor was entitled to quasi-judicial immunity:

> In each case where a prosecutor is involved in the charging process, under Virginia law, that action is intimately connected with the prosecutor's role in judicial proceedings and the prosecutor is entitled to absolute immunity from suit . . .

266 Va. at 321, 585 S.E.2d at 785. In sharp contrast, the same court in the same matter held that the building official was not entitled to quasi-judicial immunity:

> We conclude that Ring's duties as a building inspector are more akin to those of a police officer in the enforcement of laws, rules and regulations, than a prosecutor in the judicial process. As a matter of law, Ring is not entitled to the absolute immunity afforded by quasi-judicial immunity.

266 Va. at 325, 585 S.E.2d at 788. (emphasis added).

The distinction between quasi-judicial acts (which are entitled to absolute immunity) and investigatory acts (which are not entitled to absolute immunity) is further demonstrated by cases where prosecutors were not afforded absolute immunity. One example is the United States Supreme Court case of Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606 (1993), which held that a prosecutor was not entitled to absolute immunity when performing investigative functions:

> . . . so when a prosecutor functions as an administrator rather than as an officer of the court, he is entitled only to qualified immunity. There is a difference between

> the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id. at 273, 2616. (internal citations and quotes omitted) (emphasis added).

In conclusion, even a prosecutor may not be entitled to absolute quasi-judicial immunity when he or she performs acts which are investigative or ministerial in nature. Larocque did not hold hearings, weigh evidence, draw conclusions from the evidence in hearings, or exercise discretion of a judicial nature. His acts were not quasi-judicial but were ministerial in nature because he was under a statutory duty to "strictly enforce" the quantifiable provisions of the R.I. Fire Safety Code. Therefore, neither he nor the Town is entitled to quasi-judicial immunity.

C. The Rhode Island Building Inspection Cases Implicitly Fall Outside The Quasi-Judicial Realm

Building inspectors and deputy state fire marshals perform very similar functions. As explained, supra, several cases in Rhode Island have held that municipalities will be liable for the egregious negligence of local building inspectors. Implicit in those cases is that building inspectors are not entitled to quasi-judicial immunity; therefore, Larocque does not enjoy this protection. Although Mall at Coventry Joint Venture was decided on different grounds by a superior court justice, the Rhode Island Supreme Court did not hesitate to rely on quasi-judicial immunity, sua sponte, to deny liability. As stated by that court, "We often have stated that this court may affirm a justice of the superior court on grounds other than those which he or she has utilized in determining the outcome of the case." Mall at Coventry Joint Venture, 721 A.2d at 869. Because this doctrine was not raised once by the Rhode Island Supreme Court in the cases of Quality Court Condominium Assn., Boland, Haworth, or Torres, supra, that court has

implicitly held that local building inspectors are not entitled to quasi-judicial immunity. A deputy state fire marshal should be treated no differently.

D. Even If The Fire Marshal Had Some Discretionary Functions, As To Which He Is Immune, Such Immunity Would Not Apply To His Ministerial Or Mandatory Duties

It is clear from Buckley, supra, that prosecutors' absolute immunity or lack thereof will turn on the specific activity in question. 509 U.S. 273, 113 S.Ct. 2616. In fact, in the same matter, a prosecutor may be afforded absolute immunity for some activities while being afforded only qualified immunity for other activities. Clearly, this presents an issue of fact which cannot be determined based upon the pleadings. Therefore, Larocque should not be afforded quasi-judicial immunity at this time.

III. DEFENDANT LAROCQUE IS NOT PROTECTED BY § 23-28.2-17 BECAUSE HIS INSPECTIONS WERE NOT CONDUCTED IN GOOD FAITH

A. § 23-28.2-17 Requires That Inspections Be Done In Good Faith

R.I. Gen. Laws § 23-28.2-17 provides,

> The state fire marshal, his or her deputies, and assistants, charged with the enforcement of the Fire Safety Code, chapters 28.1 through 28.39 of this title, shall not render themselves liable personally, and they are hereby relieved from all personal liability for any damage that may accrue to persons or property as a result of any act required or permitted in the discharge of their official duties . . . In no case shall the fire marshal, his or her deputies, or assistants, be liable for costs in any action, suit, or proceedings that may be instituted in pursuance of the provisions of the Fire Safety Code, and any fire marshal, acting in good faith and without malice, shall be free from liability for acts performed under any of its provisions or by reason of any act or omission in the performance of his or her official duties in connection therewith.

(emphasis added).

Paragraph No. 420 of Plaintiffs' Complaint alleges that Larocque's actions were egregious, which description connotes a lack of good faith. Paragraph No. 419 of the Complaint specifically alleges that Larocque failed to adequately inspect The Station, failed to enforce fire

safety laws, allowed unsafe numbers of persons on the premises, allowed the use of dangerous pyrotechnic devices, allowed a public nuisance and a fire hazard to exist, failed to provide sufficient security and fire protection, knew of numerous dangerous conditions and fire hazards at The Station, and failed to protect members of the public. Plaintiffs have adequately alleged that Larocque lacked the good faith condition prerequisite set forth in R.I. Gen. Laws § 23-28.2-17. At the very least, it is a question of fact whether Larocque was acting in good faith and without malice and, therefore, the Town Defendants' Fed.R.Civ.P. 12(b)(6) Motion should be denied.

B. Larocque's Inspections Were Not Performed In Good Faith

Black's Law Dictionary defines good faith as ". . . being faithful to one's duty or obligation." Black's Law Dictionary 744 (6th ed. 1991). Whether or not Larocque acted in good faith is a question of fact. The issue of "good faith" as it applies to R.I. Gen. Laws § 23-28.2-20 was ruled upon by the Rhode Island Supreme Court in Vaill v. Franklin, 722 A.2d 793 (R.I. 1999). In Vaill, a fire chief instructed four of his officers to deny access into or out of a store while he went inside and conducted a general fire safety inspection. 722 A.2d at 794. Following the inspection, plaintiffs commenced an action alleging that the fire chief had conducted an unreasonable search and seizure in violation of their constitutional rights. 722 A.2d at 794. The fire chief's motion for summary judgment was granted based upon R.I. Gen. Laws § 23-28.2-20. The Rhode Island Supreme Court reversed the Superior Court and ruled that "whether Franklin is shielded from liability based upon qualified immunity is dependent on whether the inspection itself was reasonable under the circumstances in this case." 722 A.2d at 795. (emphasis added). Next, the Rhode Island Supreme Court ruled that questions of material fact remained:

> However, questions of material fact remain as to whether consent had been given and the search was reasonable, or whether an emergency situation existed which

necessitated a warrantless inspection. Consequently, summary judgment was improper as to Fire Chief Franklin.

722 A.2d at 796. (emphasis added).

Without the benefit of any discovery, Plaintiffs know that Larocque inspected The Station on at least three separate occasions prior to February 20, 2003 and that Larocque's inspection reports repeatedly mention the same (uncorrected) hazards while failing to identify other serious violations of the R.I. Fire Safety Code. In addition, Larocque increased the maximum capacity of The Station in March of 2000 by classifying the entire premises as "standing room" contrary to a report which he had prepared only three months earlier. These facts alone, without any discovery, strongly suggest a lack of good faith by Larocque.

C. The Town Has Properly Not Sought Dismissal On This Statutory Ground, As Even If § 23-28.2-17 Applies To Larocque, It Limits Immunity To Individual Liability

The Town Defendants' Memorandum has correctly not sought the dismissal of the Town of West Warwick based upon R.I. Gen. Laws § 23-28.2-17. This is true because R.I. Gen. Laws § 23-28.2-17 specifically provides that deputy state fire marshals may be ". . . relieved from all personal liability . . ." Of course, the Town of West Warwick would remain liable for Larocque's negligence even if he, personally, were entitled to immunity under R.I. Gen. Laws § 23-28.2-17.

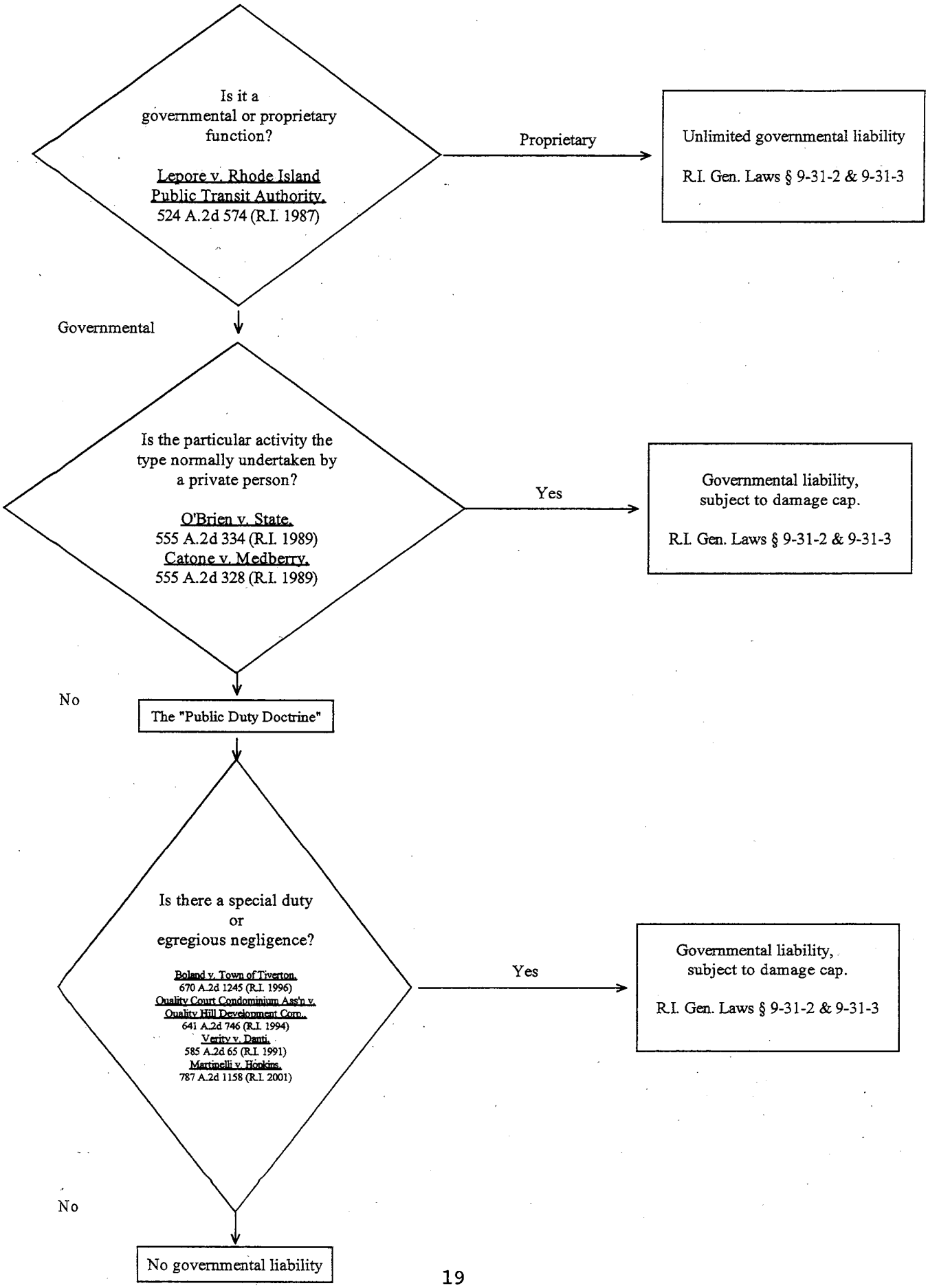
IV. THE TOWN DEFENDANTS ARE NOT PROTECTED BY THE "PUBLIC DUTY DOCTRINE"

A. Rhode Island's Analysis Of Government Tort Liability Has Evolved To Consider Multiple Factors

Rhode Island's statutory abrogation of sovereign immunity for the state and its municipalities was presaged by the Superior and Supreme Court opinions in Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970). This landmark case recognized the "anachronistic character of the doctrine of municipal immunity." Instructed by this decision, the General Assembly

enacted R.I. Gen. Laws § 9-31-1 which abolished traditional governmental immunity by making a blanket waiver. Gagnon v. State, 570 A.2d 656, 658 (R.I. 1990). However, subsequent cases have held that when it is alleged that the State or a municipality is negligent, multiple factors may determine the outcome of a plaintiff's action, including: (1) whether the activity in question was proprietary or governmental in nature; (2) whether the action/inaction in question is a function that a private person might perform; and whether (3) the state/municipality has acted egregiously or whether the plaintiff is owed a special duty. This analysis can best be summarized by the following algorithm:

R.I. GC ERNMENTAL TORT LIABILI ANALYSIS



With regard to the Town Defendants, Plaintiffs have alleged: (1) Bettencourt was performing a proprietary function; (2) Bettencourt was performing an activity which a private person might perform; and (3) both Bettencourt and Larocque acted in an egregious manner.

B. Defendant Bettencourt And The Town Have Unlimited Liability Because Bettencourt As A "Detail Policeman" Was Performing A Purely Proprietary Function

Pursuant to R.I. Gen. Laws § 9-31-3, a town will have unlimited liability ". . . in all instances in which the city or town or fire district was engaged in a proprietary function in the commission of a tort . . ." Accordingly, the issue of whether Bettencourt was engaged in a proprietary function when he failed to provide adequate security by allowing The Station to become overcrowded beyond the maximum capacity and allowing the illegal use of pyrotechnics must be resolved. "In Rhode Island, a proprietary function is one which is not 'so intertwined with governing that the government is obligated to perform it only by its own agents or employees.'" Lepore v. Rhode Island Public Transportation Authority, 524 A.2d 574, 575 (R.I. 1987), quoting Xavier v. Cianci, 479 A.2d 1179, 1182 (R.I. 1984) (street sweeping is a proprietary function).

The determination of whether a governmental activity is a governmental or proprietary function frequently involves questions of fact, Beatty v. Metropolitan Transit Authority, 860 F.2d 1117, 1126 (C.A.D.C. 1988)(summary judgment denied because of material questions of fact as to whether the activity was in performance of a governmental or proprietary function), Doran v. Waterbury Parking Authority, 408 A.2d 277 (CT 1979)("The determination of whether the operation of the parking garage was governmental or proprietary is a question of fact.") or at least a "mixed question of law and fact." Beard v. San Francisco, 79 Cal.App.2d 753, 755, 180 P.2d 744, 746 (1947). Not only is the determination of the precise nature of Bettencourt's

activity involved in the case necessarily factual, but the question whether such activity is one that government is obligated to perform by its own agents or employees frequently requires factual determinations.

For example, in Lepore v. Rhode Island Public Transportation Authority, 524 A.2d 574 (R.I. 1987), the history of RIPTA's origin and the existence of private bus lines were relied upon by the court in concluding that RIPTA's activities "could easily be performed by a private business corporation" and therefore were proprietary. Id., 524 A.2d at 574. The Rhode Island Supreme Court has held that the act of providing security is private in nature. In The Housing Authority of the City of Providence v. Oropeza, 713 A.2d 1262, 1264 (R.I. 1998), the Rhode Island Supreme Court held, "[i]t is our opinion that the function at issue here, namely, the providing of security within and by the housing authority is proprietary in nature." (emphasis added).

The security services that Bettencourt provided at The Station were clearly proprietary despite the fact that his precise responsibilities are a question of fact. The act of providing security has already been established to be a proprietary act by the Rhode Island Supreme Court in The Housing Authority of the City of Providence, supra. Therefore, Bettencourt and The Town are subject to unlimited liability.

C. Even If Bettencourt's Function Were Not Completely Proprietary, Defendant Bettencourt And The Town At Least Have Liability Up To The Statutory Cap Because Bettencourt Was Performing A Function Which A Private Person Might Perform

Bettencourt's activities were identical to activities undertaken by employees of bars/clubs/concert venues throughout this state on a nightly basis. As a result, he and the Town are subject to liability for damages up to the statutory limitation set forth in R.I. Gen. Laws § 9-31-3. In Catone v. Medberry, 555 A.2d 328 (R.I. 1989), the Rhode Island Supreme Court held

that the State/municipality would be liable when its negligence involved an activity normally undertaken by private individuals:

> We therefore hold that when the government or its agent engages in an activity normally undertaken by private individuals in the course of their everyday lives, a duty arises under the common law to exercise reasonable care in the performance of this task.

Id. at 334. The private activity doctrine was subsequently applied in O'Brien v. State, 555 A.2d 334, 335 (R.I. 1989) where the plaintiff was walking in Lincoln Woods State Park when he tripped over a horseshoe stake imbedded in the grass and in Yankee v. Leblanc, 819 A.2d 1277, 1280 (R.I. 2003), where the plaintiffs correctly pointed out that ". . . the act of trimming shrubs or vegetation is one in which private persons ordinarily engage . . ." As ruled in The Housing Authority of the City of Providence, supra, providing security is proprietary in nature. Obviously, providing security is also an activity which private persons/businesses ordinarily engage in similar to operating a park or driving a vehicle. As a result, Bettencourt and the Town are, at a minimum, subject to liability up to the statutory limits set forth in R.I. Gen. Laws § 9-31-3.

D. The Town Defendants Are Liable Because Their Misconduct Was Egregious

1. Plaintiffs' Allegations As To Larocque And Bettencourt

The Town Defendants will not be afforded protection under the public duty doctrine if they had knowledge that they created a circumstance that forced an individual into a position of peril and subsequently chose not to remedy the situation. Verity v. Danti, 585 A.2d 65 (R.I. 1991). It is clear that the State/municipalities' knowledge can be actual or constructive. Bierman v. Shookster, 590 A.2d 402, 404 (R.I. 1991). As stated, supra, Plaintiffs have alleged that Larocque and Bettencourt both acted egregiously. Larocque failed to identify several violations of the R.I. Fire Safety Code during his three prior inspections at The Station, failed to ensure that

known violations were remedied, and questionably increased the capacity of The Station. Bettencourt allowed The Station to become dangerously overcrowded and allowed the illegal use of pyrotechnics on the evening of February 20, 2003. In addition, he may have failed to take action after observing other violations and hazards during that evening. Therefore, similar to Verity and Bierman, Plaintiffs have alleged actual and constructive knowledge of circumstances that forced the Plaintiffs into a position of peril.

2. Rhode Island's Cases Have Recognized The "Creation" Of Egregious Circumstances On Far Milder Facts

Plaintiffs have alleged that Bettencourt and Larocque's negligence was a proximate cause of the death of one hundred individuals and the injury of approximately two hundred individuals. The circumstances of this case are more egregious than other cases in which liability has been upheld by the Rhode Island Supreme Court. In Verity, the State was aware of a tree which had existed for more than one hundred years and ultimately obstructed an entire sidewalk. Verity, 585 A.2d at 67. A pedestrian approached the obstruction, and was hit by an automobile when she stepped into the road to pass the tree. 585 A.2d at 65-66. In Martinelli v. Hopkins, 787 A.2d 1158, 1169 (R.I. 2001), a trial justice found that the Town of Burrillville failed to inspect a licensed premises, permitted an entertainer to assemble an indefinite crowd size, and had abundant notice that a festival was an extraordinary event. Id. at 1168. In Martinelli, the plaintiff was injured because a rotted tree fell on him when people attempted to urinate in the woods by traversing a snow fence that was attached to the rotted tree. 787 A.2d at 1163. Finally, in Bierman v. Shookster, 590 A.2d 402, 404 (R.I. 1991), an automobile accident occurred in Providence as a result of a malfunctioning traffic signal. The court ruled, "By failing to correct the malfunction, of which it should have been aware, the city jeopardized the safety of

those utilizing the intersection in reliance on the traffic lights." 590 A.2d at 404. (emphasis added).

It is clear that the "creation" of a circumstance can occur by omission. For instance, in Verity the State failed to remove a tree. In Bierman, the City of Providence failed to repair a malfunctioning traffic light. In Martinelli, the Town of Burrillville licensed an event without inspecting the premises and "clos[ed] its eyes to risks and hazards that attendees would encounter." Similar to these omissions, Larocque and Bettencourt closed their eyes to risks and hazards that occupants of The Station encountered on the evening of February 20, 2003.

Finally, the Town Defendants attempt to distinguish Plaintiffs' case from Martinelli by stating that Plaintiffs have not alleged a long history of events that would impose knowledge on the Town. Although Plaintiffs disagree with this characterization, it should be remembered that Mr. Martinelli (unlike the Plaintiffs in this action who have just recently filed their Complaint) had the benefit of discovery and a trial in which to develop the requisite facts.

E. It Is Virtually Impossible, At The Pleadings Stage, To Rule Out Egregiousness

The Rhode Island Supreme Court has specifically stated that it is "virtually impossible" for the State to obtain judgment on the pleadings in cases involving the public duty doctrine.

> It is virtually impossible for the State to sustain such a burden when the pleadings are viewed in a manner most favorable to the plaintiff. Consistent with Rule 8's pleading requirements, the plaintiff is not obligated to provide in the complaint details concerning the state's awareness of or reaction to the circumstances surrounding his or her claim. Such information is, in any event, frequently unavailable to a plaintiff at the pleading stage. Any gaps in the pleadings regarding the state's conduct as it bears upon the plaintiff's action are to be read in the plaintiff's favor. In light of the fact-intensive exceptions to the public duty doctrine, the trial court is unlikely to be able to hold that the plaintiff could not establish the state's negligence under any set of facts that might be adduced at trial. Accordingly, we conclude that controversies in which the public duty doctrine are asserted as a defense will rarely be appropriate for disposition by means of a Rule 12(c) motion for judgment on the pleadings.

Haley v. Town of Lincoln, 611 A.2d 845, 849-50 (emphasis added)(expressly applying this holding to motions to dismiss for failure to state a claim under Rule 12(b)(6)). While the Town Defendants' Memorandum acknowledges that it is "virtually impossible" to succeed on a motion to dismiss based on the public duty doctrine, it goes on to argue that there are occasions when dismissal is appropriate. Town Defendants' Memorandum, p. 14, fn. 7. However, the two cases cited by Defendants in support of this proposition were decided before the Rhode Island Supreme Court enunciated the egregious conduct exception to the public duty doctrine. Ryan v. State Dept. of Transportation, 420 A.2d 841 (R.I. 1980); Orzechowski v. State, 485 A.2d 545 (R.I. 1984).

F. Both Larocque And Bettencourt Owed Plaintiffs A Special Duty

Even if the actions of Larocque and Bettencourt were not egregious, it would likely be held that each owed The Station fire victims a special duty; this, because their contacts with the venue made the identity of likely victims apparent.

The Rhode Island Supreme Court recognized in Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994) that a special duty can arise where an inspector has repeated contacts with a given property such that its owners and users are reasonably ascertainable to him. Similarly, in Boland v. Town of Tiverton, 670 A.2d 1245 (R.I. 1996), a question of fact arose as to whether a special duty was owed where town inspectors had prior contacts with a building's owners. Here, as in Quality Court and Boland, inspector Larocque had repeated (at least three) contacts with the subject real estate and its owners, allowing him to ascertain the owners and likely victims. As to officer Bettencourt, he was on-site the night of the fire for several hours with opportunity to personally observe every likely victim of his permitted overcrowding. On these facts it may well be found, following discovery,

that both Larocque and Bettencourt owed Plaintiffs a special duty as that term has been defined in Rhode Island caselaw.

V. THE USE OF PYROTECHNICS WAS NOT SO UNFORESEEABLE AS TO RENDER IT AN "INTERVENING SUPERSEDING CAUSE"

The Town Defendants have argued that their actions were not "the proximate cause" of the injuries sustained by Plaintiffs. In addition, the Town Defendants argue that the illegal actions of other defendants (i.e. the failure to obtain a permit to possess and display pyrotechnics and a failure to obtain a certificate of competency to possess or display pyrotechnics) superseded any negligence by the Town Defendants. However, the Town Defendants' reliance upon Rhode Island case law completely ignores cases upholding concurrent proximate causes of injuries. The Town Defendants correctly cite 65 C.J.S. Negligence 111 d., which states, "...[i]f no danger existed in the condition except because of the independent cause, such condition was not the proximate cause . . ." However, we specifically maintain that Larocque and Bettencourt's affirmative acts created a dangerous condition prior to the actual fire and was a proximate cause of this tragedy.

The determination of proximate causation and the existence of any superseding cause is a question of fact. Spendorio v. Bilray Demolition Co., Inc., 682 A.2d 461, 467 (R.I. 1996). Proximate cause is proven by showing that "...but for the negligence of the tortfeasor, injury to the plaintiff would not have occurred." Martinelli v. Hopkins, 787 A.2d 1158, 1169 (R.I. 2001). Circumstantial evidence can be sufficient to prove proximate causation. Martinelli, 787 A.2d at 1169. In addition, if two individuals' acts cause one injury, both individuals are liable:

> It should be noted that the plaintiff was not required to prove that the town's negligence was *the* proximate cause for his injuries and damages, but only that it was *a* proximate cause which, standing alone, or in combination with any other defendant's negligence, contributed to the plaintiff's injuries.

Martinelli, 787 A.2d at 1170. (emphasis added by court).

A. It Was Reasonably Foreseeable That Fire Safety Code Violations And Overcrowding Would Result In Harm

As is true with the issue of legal duty, a key determinant on the issue of superseding causation is foreseeability; that is, was it or should it have been reasonably foreseeable to Larocque and Bettencourt that their alleged negligent conduct could be expected to lead to harm?[6] This court has noted that:

> Determinations of foreseeability, and specifically of whether a Plaintiff's injury was proximately caused by a Defendant's negligent acts, or instead by the intervening act of a responsible third person, are ordinarily issues of fact, and are therefore usually not determined by summary judgment.

Travelers Insurance Co. v. Priority Business Forms, Inc., 11 F.Supp.2d 194, 199 (D.R.I. 1998). One very instructive judicial effort to define foreseeability is found in Bigbee v. Pacific Telephone and Telegraph Company, 192 Cal.Rptr. 857, 665 P.2d 947 (1983). The plaintiff therein was seriously injured when the telephone booth in which he was standing was struck by a motorist whose car left the roadway. The booth was located in close proximity to a major thoroughfare. When he saw the motorist approaching, the plaintiff attempted to exit the telephone booth but the door jammed. The plaintiff brought suit against several parties including the companies that designed, located, installed and maintained the telephone booth, asserting that it was negligently designed. He asserted that if the door had operated freely, he would have escaped injury; also, that the booth was situated too close to a road where drivers often speeded, thereby "creating an unreasonable risk of harm to anyone who used the telephone booth." 192 Cal.Rptr. 857, 858, 34 Ca.3d 49, 53, 665 P.2d 947, 948 (1983). The defendants argued that they

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[6] If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken. S.M.S. Sales Co., Inc. v. New England Motor Freight, Inc., 115 R.I. 43, 47, 340 A.2d 125, 127 (1975), citing Aldcroft v. Fidelity & Gas Co., 106 R.I. 311, 259 A.2d 408 (1969); and Denisewich v. Pappas, 97 R.I. 432, 198 A.2d 144 (1964).

had no duty to protect anyone who used the telephone booth from cars colliding with it, as the risk was unforeseeable. They also claimed the negligence of the driver was a superseding cause of the plaintiff's injuries.

When addressing the ultimate issue in the case, that is, whether there was "room for a reasonable difference of opinion" as to the foreseeability of the risk a car might hit the telephone booth and injure the plaintiff, the Bigbee court first laid out its definition of foreseeability:

> It is well to remember that foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.

Id. at 862, 57 and 952, citing 2 Harper & James, Law of Torts, (1956), § 18.2, at p. 1020.

One may be held accountable for creating even "the risk of a slight possibility of injury if a reasonably prudent [person] would not do so." Id. citing Ewart v. Southern Cal Gas Co., 237 Cal.App.2d 163, 172, 46 Cal.Rptr. 631 (1965), quoting from Vasquez v. Alameda, 49 Cal.2d 674, 684, 321 P.2d 1 (dis. opn. of Traynor, J.) [emphasis added]. Finally, the court went on to say that "what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence." Id. See also Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827 (R.I. 1986).

In Martinelli, supra, the Rhode Island Supreme Court found that the Town of Burrillville's negligent issuance of a license, coupled with the later failure to control an event (through its police officers) was a proximate cause of injuries sustained by the plaintiff. 787 A.2d at 1170. In Martinelli, several intoxicated event attendees attempting to urinate in the woods by breaching a portion of a snow fence that was fastened to a rotted tree. 787 A.2d at 1170. In doing so, the rotted tree, to which the fence was attached, fell and injured the plaintiff. 787 A.2d 1170.

The failure to identify and/or order the remediation of violations of the R.I. Fire Safety Code and the allowance of overcrowding of The Station were substantial causes of the injuries and deaths that resulted on February 20, 2003. The risk of fire in a nightclub, and elsewhere, can come in many forms, only one of which includes the use of a pyrotechnic display by a rock and roll band.[7] In no way was the harm here of a kind and degree so far beyond the risk foreseeable to inspectors or security persons that it would be unfair to hold the Town Defendants responsible.

B. Plaintiffs Do Not Allege That The Fire Was Intentionally Ignited

The Town Defendants place significant reliance upon Travelers Insurance Co. v. Priority Business Forms, Inc., 11 F.Supp. 2d 194 (D.R.I. 1998), which ruled "the commission of arson by a third party is not the natural and probable result of discontinuing a burglar alarm system and failing to notify the landlord thereof." Id. at 200. (emphasis added by court). The facts of Plaintiffs' action are readily distinguishable from the facts of Travelers Insurance Co. First, although Plaintiffs have alleged that certain defendants committed illegal acts by igniting pyrotechnics without the proper permits and licensing, there is absolutely no allegation that someone intentionally ignited The Station, unlike the intentional act of arson in Travelers Insurance Co. Second, unlike Travelers Insurance Co., where the court emphasized the fact that a burglar alarm system was discontinued prior to the fire at the premises, it is clear that the R.I. Fire Safety Code was enacted to ". . . safeguard life and property from the hazards of fire and

[7]In a nightclub setting like The Station, there is a foreseeable risk of fire from a number of sources. Patrons come to a nightclub for the primary purpose of enjoyment that, depending upon the individual, can include listening to live music, dancing, and socializing with friends and acquaintances. However, this is frequently done in a crowded, poorly illuminated environment. Along with this comes alcohol consumption, and frequent cigarette smoking that requires use of lit matches or lighters. If a nightclub like The Station presents live music, high-powered amplifiers, musical instruments and related equipment requiring a substantial electrical power source are common. Inevitably, stage lighting is used as well, not only requiring additional power sources but generating significant heat. In the case of The Station, which would periodically present musical acts with a national reputation, the risk of fire is even greater as such performers, like Great White, may produce and present stage shows that are more elaborate, employing props and pyrotechnics. (See "*Band's pyrotechnics use varied on tour*", Providence Journal, March 3, 2003).

explosives . . ." R.I. Fire Safety Code § 1. Therefore, the relationship between a burglar alarm and arson is much more tenuous than the relationship between the enforcement of the R.I. Fire Safety Code and a fire (Larocque and Bettencourt) or the relationship between overcrowding and the inability of patrons to exit (Bettencourt). The particular source of the fire has no bearing on Plaintiffs' action because, regardless of the ignition source, Bettencourt and Larocque's actions/inactions had not become "totally inoperative" by the time of the fire, as required by Hueston.

C. Even Intentional Criminal Conduct May Be Foreseeable

Even in situations where an intentional criminal act occurs, liability may attach to other defendants. For instance, in Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984), the defendant security service corporation hired a security guard who took part in thefts of the plaintiff's property, while he was on duty at the plaintiff's premises. Id. at 438. The Rhode Island Supreme Court ruled that the criminal acts were reasonably foreseeable:

> We are of the opinion that Lawson's succumbing to temptation and his participation in the criminal thefts might be found by a rational trier of fact to be a reasonably foreseeable result of Pinkerton's negligence in taking reasonable steps to assure its employee's honesty, trustworthiness, and reliability.

474 A.2d at 444. The Court went on to rule that the foreseeability of the criminal act was a jury question. 474 A.2d 444.

VI. THE TOWN DEFENDANTS' ACTIONS CONSTITUTED COMMON LAW CRIMES GIVING RISE TO CIVIL LIABILITY UNDER R.I.G.L. § 9-1-2

Defendants briefly argue that the Town Defendants' acts and omissions cannot constitute criminal acts under Rhode Island law. However, this argument overlooks R.I. Gen. Laws § 11-1-1 which provides that "every act and omission which is an offense at common law, and for which

no punishment is prescribed by the General Laws, may be prosecuted and punished as an offense at common law . . ." The significant effect of R.I. Gen. Laws § 11-1-1 was described in State v. LaPlume, 118 R.I. 670, 375 A.2d 938 (1977) which ruled, "Since this section makes every act which is an offense at common law punishable in Rhode Island, the Legislature intended to preserve and not impair or abrogate the common law." Id. at 678, 942. Clearly Larocque has committed the common law crimes of criminal misfeasance and/or nonfeasance. The negligent failure of an officer to perform a ministerial duty imposed upon him by law is a common law misdemeanor. State v. Winne, 21 N.J.Super. 180, 203, 91 A.2d 65, 76 (". . . [I]t is a general rule of the common law that willful neglect or failure of a public officer to perform any ministerial duty which by law he is required to perform is an indictable offence."); LaTour v. Stone, 139 Fla. 681, 692, 190 So. 704, 709 (1939) ("At common law a failure or neglect of an officer to perform a ministerial duty imposed upon him by law renders him guilty of a misdemeanor; and it would seem that, notwithstanding the provisions of a statute which have been disobeyed are, as respects to public, merely directory, the neglect of the officer to observe them may be a misdemeanor.").

Criminal misfeasance is the improper performance of some act. In Larmore v. State, 180 Md. 347, 348, 350, 24 A.2d 284, 285, 286 (1942), a conviction of criminal misfeasance was upheld where county commissioners negligently approved and passed for payment fictitious and fraudulent claims. Finally, as stated in State of Florida v. Egan, 287 So.2d 1, 5 (1973), "The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government." (citations omitted).

Plaintiffs' Complaint alleges that Larocque and Bettencourt neglected their duties and, accordingly, they were guilty of the common law crimes of criminal misfeasance and/or nonfeasance. As stated in R.I. Gen. Laws § 9-1-2, it is irrelevant that they have not been prosecuted for that offense. Therefore, the Town Defendants' Fed.R.Civ.P. 12(b)(6) motion must be denied.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully urge that the Town Defendants' Motion to Dismiss be denied.

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